

IN THE

MICHAEL RODAK

**Supreme Court of the United States**

**October Term, 1972**

No. **82-929**

**PRISCILLA L. CHERRY, NORA H. FERGUSON  
and ADAMINA RUIZ,**

*Appellants,*

**vs.**

**COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,  
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,  
ROBERT B. ESSEY, FLORENCE FLAST, REBECCA GOLDBLUM,  
BENJAMIN HAINBLUM, MARTHA LATIES, BLANCHE LEWIS,  
ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NRIER,  
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,  
and CHARLES H. SUMNER,**

*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

**JURISDICTIONAL STATEMENT**

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IN THE  
**Supreme Court of the United States**

October Term, 1972

No. ....

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PRISCILLA L. CHERRY, NORA H. FERGUSON  
and ADAMINA RUIZ,

*Appellants,*

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,  
BERT ADAMS, BERNARD BACKER, ALGERNON D. BLACK,  
THEODORE BROOKS, HERSCHEL CHANIN, NAOMI A. COWEN,  
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ELLEN A. MEYER, EDWARD D. MOLDOVER, ARYEH NEIER,  
DAVID SEELEY, ALBERT SHANKER, HOWARD M. SQUADRON,  
and CHARLES H. SUMNER,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

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**JURISDICTIONAL STATEMENT**

Appellants submit this Statement to show that this Court has jurisdiction of their appeal from so much of the judgment of the United States District Court for the Southern District of New York as declares Section 2 of Chapter 414 of the 1972 Laws of New York to be violative of the Establishment Clause of the First Amendment and permanently enjoins its enforcement. It is submitted that substantial issues of public importance are presented by this appeal and that this Court should exercise its jurisdiction.

### Opinions Below

The opinions of the District Court, upon which the judgment appealed from was entered, are, as yet, unreported. Copies of the opinions are set forth in the Appendix, commencing at pages 1a and 40a. In addition, an earlier per curiam opinion not directly related to that part of the judgment appealed from by these appellants is set forth at page 46a.

### Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment. The judgment of the District Court was entered on October 20, 1972. A copy of the Order and Judgment is set forth in the Appendix, pages 48a-51a. Appellants filed their Notice of Appeal on October 27, 1972 in the District Court. A copy is set forth in the Appendix at page 52a.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon v. Kurtzman*, *Earley v. DiCenso* and *Robinson v. DiCenso*, 403 U.S. 602 (1971), and *Tilton v. Richardson*, 403 U.S. 672 (1971).

### Statute Involved

The statute involved is Chapter 414 of the 1972 Laws of New York, entitled "An Act to amend the education law, in relation to health, welfare and safety grants for pupils in nonpublic schools; to establish an elementary and secondary education opportunity program of tuition reimbursement for parents of low income; to amend the tax law, in relation to a modification of federal adjusted gross income for parents of nonpublic school children; and to amend the education law, in relation to impacted aid for school districts and the purchase of existing structures to be used for school buildings." N.Y. Educ. Law §§ 408(1), 408(2), 408(3), 408(6), 549-53, 559-63, 3602(6), 3602(15) (McKinney Cum. Supp. 1972); N.Y. Tax Law §§ 612(c)(14), 612(j) (McKinney Cum. Supp. 1972). The full text of the statute [hereinafter referred to as "Chapter 414"] is set forth in the Appendix, commencing at page 55a.

Section 2 of Chapter 414, which is the only section to which this appeal and Jurisdictional Statement are applicable, requires the Commissioner of Education of New York State to make tuition reimbursement payments to parents of pupils enrolled full-time in nonpublic schools whose New York taxable income is below \$5,000 and who have paid \$20 or more in tuition to such schools in a given calendar year. These payments are to be the lesser of either (a) 50% of the tuition paid or (b) \$5 per school month for pupils in grades 1-8 or \$10 per school month in grades 9-12.

### Question Presented

Is the Establishment Clause violated by Section 2, which grants partial reimbursement by the State for tuition paid by low-income parents in exercising their constitutional right to send their children to religiously-affiliated nonpublic schools which are required by New York law to provide a secular education "at least substantially equivalent" to that received in the public schools?

### Statement of the Case

Immediately after Chapter 414 was signed into law in May, 1972, appellees instituted this action in the United States District Court for the Southern District of New York against Ewald B. Nyquist, Arthur Levitt and Norman Gallman in their respective capacities as Commissioner of Education, Comptroller and Commissioner of Taxation and Finance of the State of New York, praying that enforcement of Sections 1 through 5 of Chapter 414 be permanently enjoined on the ground, *inter alia*, that these sections violate the Establishment Clause.

A three-judge District Court was convened, consisting of Judge Paul R. Hays of the Court of Appeals for the Second Circuit and Judges John M. Cannella and Murray I. Gurfein of the District Court. Appellants Cherry, Ferguson and Ruiz were permitted to intervene as parties defendant on the ground that they are parents of nonpublic school children who qualify for reimbursement pursuant to Section 2 of Chapter 414.<sup>1</sup> Senator Earl W. Brydges was

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<sup>1</sup> Appellants' motion to intervene was joined in by four parents of nonpublic school children who qualify for modification of their New York adjusted gross incomes pursuant to Section 5 of Chapter 414.

also permitted to intervene as a party defendant in his capacity as Majority Leader and President Pro Tem of the New York State Senate.

No discovery or trial was had. The case was briefed and argued to the Court on July 6, 1972. On October 2, 1972, Judge Gurfein filed an opinion, concurred in by Judges Cannella and Hays, that Section 2 is violative of the Establishment Clause.

Appellants appeal from so much of the judgment as declares that Section 2 of Chapter 414 violates the Establishment Clause and permanently enjoins its enforcement.<sup>3</sup>

### **The Questions Are Substantial**

For almost two centuries, the public and nonpublic schools in New York have comprised a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education and have been governed as to secular matters by the compulsory education statute, N.Y. Educ. Law § 3204. This statute specifies that if children are educated in nonpublic schools the instruction

<sup>3</sup> The court also unanimously held Section 1 of Chapter 414 (dealing with funds for repair and maintenance) unconstitutional. Judges Gurfein and Cannella held that Sections 3, 4 and 5 of Chapter 414 (dealing with tax adjustments for middle-income parents of nonpublic school children) are constitutional. Judge Hays filed a dissenting opinion on this point.

<sup>4</sup> Defendants Nyquist, Levitt and Gallman and Senator Earl W. Brydges have separately appealed from this part of the judgment, as well as from that part of the judgment declaring Section 1 of Chapter 414 to be in violation of the Establishment Clause and permanently enjoining its enforcement. Docket Nos. 72-791 and 72-753.

Appellees have appealed from the District Court's judgment upholding the constitutionality of Sections 3, 4 and 5. Docket No. 72-694.

given must be "at least substantially equivalent" to that given in public schools, and statutes and regulations impose upon nonpublic schools detailed requirements as to attendance, curricula, accreditation, examinations and diplomas. As this Court observed in *Board of Education v. Allen*, 392 U.S. 236 (1968):

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education. 392 U.S. at 247-48.

Approximately 20% (800,000) of all school children in New York State attend nonpublic schools.<sup>4</sup> Of these 800,000 children, a substantial number come from families at or below the poverty level. While exact figures are not available, it has been reliably estimated that there are presently about 100,000 families with (some 125,000) children enrolled in Catholic schools in New York State and incomes of less than \$5,000 per year and which thus qualify for limited tuition reimbursement under Section 2.

A substantial number of these parents come from ghetto areas and minority groups. In New York City, for example, out of 65,937 pupils enrolled last year in Catholic elementary schools in the Bronx, New York and Richmond counties, 30,992 were non-white. "Today, more than sixty per-

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<sup>4</sup> A majority, but by no means all, of these nonpublic schools are affiliated with the Catholic Church. As of the fall of 1968, there were 327 nonpublic schools affiliated with religious bodies other than the Catholic Church and 296 with no religious affiliation. See State Educ. Dep't, *Financial Support—Nonpublic Schools—New York State* 3 (1969).

cent of [Catholic nonpublic school] elementary school students in Manhattan are Black or Spanish-speaking; thirty percent in the Bronx." *Hearings on H.R. 16141 and Other Pending Proposals Before Committee on Ways and Means*, 92nd Cong., 2d Sess., pt. 3, at 583 (Sept. 7, 1972).

Recognizing the vital need to maintain, especially for low-income parents such as these, the freedom of educational choice recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and recently reiterated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the New York Legislature enacted Section 2 on the basis of specific findings that:

1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.

2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated. Appendix, p. 61a.

The purpose of Section 2 is thus to provide limited assistance to parents who, because of their economic circumstances,<sup>5</sup> might otherwise not be able to exercise a mean-

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<sup>5</sup> All of the intervenor parents who join in this appeal have incomes of less than \$5000 per year and are thus eligible for tuition reimbursement under Section 2. Appellant Cherry, who is divorced,

ingful alternative to sending their children to public schools, when, either for moral or religious reasons, or for discipline or specific secular educational respects, those parents prefer nonpublic schools.

Section 2 is not, it should be emphasized, a broad program under which the state undertakes responsibility for tuition of all children attending religiously-affiliated nonpublic schools. It is carefully limited to meeting a pressing modern problem of low-income parents (and their children) who would otherwise be denied the freedom of educational choice possessed by more affluent members of our society. It is analogous to numerous other enactments providing food stamps, medical assistance and other services oriented to the needs of families at or below the poverty level. The class of persons qualifying for reimbursement under Section 2 is limited to persons earning less than \$5,000 per year. The amount of reimbursement is also limited to the lesser of either (a) one-half of the tuition paid or (b) \$5 per school month for elementary school pupils and \$10 per school month for high school pupils. Thus, on the basis of a ten-month school year, the maximum amount of reimbursement is \$50 per year for a child in elementary school and \$100 per year for a child in high school.

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has two sons who attend a nonpublic high school in Brooklyn. Their combined tuition for the school year 1971-72 was approximately \$500.00. Under Section 2, she would be entitled to a total reimbursement of \$200 for the year. Appellant Ferguson has a daughter who also attends a nonpublic high school in Brooklyn. Appellant Ferguson, a widow on pension, paid \$700.00 in tuition for the past school year. Under Section 2, she would be entitled to be reimbursed in the amount of \$100. Appellant Ruiz has two daughters who attend nonpublic high schools in Manhattan. She paid \$40.00 tuition per month for the school year 1971-72. She is now paying \$100.00 per month. Under Section 2, she would be entitled to a total reimbursement of \$20 per month.

No case previously decided by this Court has passed on such a limited system of reimbursement, and we respectfully urge that, in view of the serious condition of public and nonpublic education in the poorer sections of our cities and the obvious advantage of preserving for low-income parents a meaningful educational choice, the decision of the District Court invalidating Section 2 warrants full review by this Court. As this Court has recently stated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971):

... Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. . . .

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.\*

We suggest that this case provides an opportunity for a meaningful analysis of the problem of limited tuition reimbursement in light of the criteria set forth above and that, based on such an analysis, the judgment of the District Court as to Section 2 was erroneous.

#### ***Secular Legislative Purpose***

The District Court did not find that Section 2 lacked a secular legislative purpose, and, indeed, there can be no basis for any finding of a legislative intent to aid religion.

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\* See also *Tilton v. Richardson*, 403 U.S. 672, 678 (1971).

Rather, the District Court accepted the findings of the New York Legislature, stating that:

... we wish to make it clear that we accept these findings ... They sum up legislative purposes which are cast as secular in intent. Appendix, p. 7a.

We submit that Section 2 clearly meets this Court's "secular legislative purpose" test.

### ***Principal or Primary Effect***

Under this Court's prior decisions, a state statute is not invalid under the Establishment Clause because one effect may be the advancement of religion. As was stated in *Tilton v. Richardson*, 403 U.S. 672 (1971), the crucial question

is not whether *some* benefit accrues to a religious institution as a consequence of the legislative program, but whether *its principal or primary effect* advances religion. 403 U.S. at 679 (emphasis added).

. . . . .

The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield v. Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

See also *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 672 (1970). Indeed, even in *Lemon v. Kurtzman*, this Court did not disagree with the finding of the District Court that the primary effect of the Pennsylvania statute permitting payment of salary supplements to parochial school teachers was not the advancement of religion. See 310 F. Supp. at 46.

We suggest that the principal or primary effect of Section 2 is the nurturing of a pluralistic society and the enhancement of the right of low-income parents to a meaningful choice in the education of their children.

In addition to nurturing a pluralistic society, a secondary effect of Section 2 would be to alleviate the problem of the already overcrowded and understaffed "inner-city" public schools by encouraging, through partial reimbursement of tuition payments, low-income parents of children attending nonpublic schools in those areas not to transfer their children to public schools because of an inability to pay the tuition required by nonpublic schools. Eligibility is restricted, and the amount of any reimbursement is restricted. Section 2 is thus meticulously aimed at the problem of low-income or poverty parents living in areas which would be most seriously affected by large scale shut-downs of nonpublic schools and transfers of pupils to the already hard-pressed public schools therein.

In *Lemon v. Sloan*, 340 F. Supp. 1356 (E.D. Pa. 1972), docket no. on appeal 72-459, the Court invalidated a statute providing flat tuition grants to all parents of nonpublic school parents without regard to need on the ground that its principal or primary effect was the advancement of

religion.<sup>7</sup> In so doing, the court sought to draw a distinction between tuition reimbursement, on the one hand, and the furnishing by the state of services to the nonpublic school or pupil, on the other. It concluded that since tuition was essential to nonpublic schools, any reimbursement of such tuition was constitutionally impermissible. Judge Lord stated:

... By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools. 340 F. Supp. at 1364.

This reasoning completely misapplies the principal or primary effect test and ignores this Court's repeated state-

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<sup>7</sup> The Pennsylvania statute found unconstitutional by the District Court in *Sloan* provides for payments of \$75 and \$150 to parents of elementary and secondary nonpublic school pupils, respectively, or "the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser." [1971] Laws of Pa. No. 92, § 7, Pa. Stat. tit. 24, § 5707. In other words, it provides flat grants to all parents without correlation to their financial needs. The act entitles many parents, rich and poor alike, to payments equal to the entire amount of tuition they actually paid. Under Section 2 of Chapter 414, on the other hand, appellant Cherry, with two high school sons and a New York taxable income of less than five thousand dollars and who paid \$500.00 in tuition, is entitled only to a \$200 reimbursement. As stated above, appellant Ferguson, with a daughter in high school and a New York taxable income of less than \$1,000 and who paid \$700.00 in tuition,<sup>8</sup> is entitled to only a \$100 reimbursement. Appellant Ruiz, with two daughters in high school and a New York taxable income of less than five thousand dollars and who paid \$400.00 (and now pays \$1,000) in tuition, is entitled to only a \$200 reimbursement.

ments that a statute is not unconstitutional simply because an effect is or may be to help religion. Rather, as stated by the Chief Justice in *Tilton* and as elucidated in earlier decisions such as *Allen* and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), a statute will be invalidated *only* where advancement of religion is the *principal or primary effect*. In the case of Section 2, any advancement of religion would be incidental.

In *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio), *aff'd*, 41 U.S.L.W. 3182 (Docket No. 71-1664, Oct. 10, 1972), the District Court, in striking down an Ohio parental reimbursement program, did not hold that the principal or primary effect was to advance religion.

The Ohio statute was strikingly different from Section 2 of Chapter 414. It provided flat grants to all parents of \$90.00 per nonpublic school pupil, also without any correlation to the financial situation of the parent. Before a parent could receive such a grant, he must have "spent an amount equal to or in excess of the per-child grant for the purpose of providing educational opportunities to his child equivalent to those available to children in the public schools . . ." Thus, a person who spent \$90.00 would have gotten back 100 percent, \$100.00 90 percent, and so on. Just as is true with the Pennsylvania statute, but unlike Section 2 of Chapter 414, the Ohio act contained no mechanism for limiting the aid to one half or less of the tuition actually paid by parents who have a grave financial need. Presumably, the entire tuition fee for some children could be subject to state reimbursement under the Ohio statute. This Court's action in affirming the District Court's judgment in *Wolman* should therefore not preclude full review of Section 2 of

Chapter 414, which is explicitly limited as to qualified parents and as to amounts reimbursed.

There are innumerable laws, both federal and state, which result in far greater direct benefits to church-related educational institutions than the conceptual benefit conferred by Section 2. For example, the Veterans Readjustment Benefits Act of 1966<sup>9</sup> ("G.I. Bill of Rights") and National Defense Education Act of 1958<sup>10</sup> provide tuition payments (and in the case of the G.I. Bill, textbooks) for student veterans attending schools and colleges of their choice, whether public or private, secular or religious. The War Orphans' and Widows' Educational Assistance Act<sup>11</sup> provides for subsistence, tuition, etc. for widows and children of persons in the armed forces who die of service connected disabilities, regardless of whether the tuition is at public or private educational institutions. The New York State Regents Scholarship Program<sup>12</sup> provides 19,500 scholarships annually to apply toward tuition at any public or nonpublic post-secondary school, regardless of religious affiliation, with the amount of the scholarship varying depending on the income of the student's family. The New York State Scholar Incentive Program<sup>13</sup> authorizes grants to students attending any public or nonpublic post-secondary school, regardless of religious affiliation, provided the student meets specified academic standards, with the amount of the grant varying, depending on the income of

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<sup>9</sup> 38 U.S.C. ch. 33.

<sup>10</sup> 20 U.S.C. ch. 17.

<sup>11</sup> 38 U.S.C. § 1700 *et seq.*

<sup>12</sup> N. Y. Educ. Law § 601.

<sup>13</sup> N. Y. Educ. Law § 601-a.

the student's family. The Elementary and Secondary Education Act of 1965<sup>13</sup> provides funds to local educational agencies to meet the special educational needs of children from low-income families; authorizes grants for acquisition of school library resources, textbooks and other instructional materials for the use of children and teachers in both public and private elementary and secondary schools; and authorizes grants for supplementary educational centers and services. The Legislative Reorganization Act of 1946<sup>14</sup> provides that pages in the Senate, House of Representatives and this Court may be educated either in the public schools of the District of Columbia or in "a private or parochial school of their own choice," the cost thereof to be borne by the United States Treasury.

The purpose of these various statutes was certainly not to advance religion. Rather, it was to meet the special needs of certain groups, such as veterans, war orphans, low-income families, and even pages in Congress and this Court, for financial assistance in obtaining an education. In view of this, we suggest that the action of the District Court in invalidating Section 2 deserves a full review by this Court.

### ***Excessive Entanglement or Involvement***

The third part of the test summarized in *Lemon v. Kurtzman* and *Tilton* is whether a statute fosters "excessive government entanglement with religion".

This Court has recognized: "No perfect or absolute separation [between religion and government] is really possible;

<sup>13</sup> 79 Stat. 27.

<sup>14</sup> 2 U.S.C. § 88a.

the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.” *Walz v. Tax Commission of the City of New York*, 397 U.S. at 670. “In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.” *Lemon v. Kurtzman*, 403 U.S. at 615. But, “[n]o one of these three factors standing alone is necessarily controlling,” *Tilton v. Richardson*, 403 U.S. at 688 (Burger, C.J.); it is their combination which is decisive.

In *Walz*, this Court found that tax exemptions for church-owned properties resulted in “. . . only a minimal and remote involvement . . . far less than taxation.” 397 U.S. at 676. In *Tilton*, this Court found that a federal statute providing construction grants for secular-purpose buildings at religiously-affiliated colleges and universities did not foster excessive entanglement with religion for several reasons, including the absence of any need for “. . . intensive government surveillance.” 403 U.S. at 687.

On the other hand, the Rhode Island and Pennsylvania statutes providing for state payment of the salaries of teachers of secular courses in nonpublic schools were invalidated because of the need for extensive probing by the state into the internal affairs of the schools to ensure that the state funds were being used only for secular teaching. This Court stated in *Lemon v. Kurtzman* with respect to the Rhode Island statute:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church. 403 U.S. at 619.

And with respect to the Pennsylvania statute:

... In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state. 403 U.S. at 621-22.

Tested by these criteria, any government involvement in or entanglement with religion is nonexistent or inconsequential in the case of Section 2. A low-income parent simply fills out a form which provides standard information concerning himself and his child and sets forth the number of months of attendance and the amount of tuition paid. This information is then certified by the school authorities and forwarded to the State Education Department. Since the only relevant facts are the parent's income, the amount of tuition paid and the fact and periods of attendance by the child, there can be no occasion for any surveillance by the state of the nonpublic school's activities beyond that which has always been conducted to ensure compliance by such schools with the academic and other requirements imposed on all schools, public and nonpublic alike, by the New York Education Law.

The District Court in its opinion raised extreme hypothetical questions irrelevant to this case:

... If State subsidy may be given for religious education, why may it not be given to the poor for the purchase of sacramental wine, or a crucifix or a Torah, a printing press for Jehovah's Witnesses, or a trip to a Baptist convention or to hear a favorite evangelist, or for a Muslim to take his pilgrimage to Mecca. Appendix, p. 28a.

This case does not involve such hypothetical eventualities, but rather deals with the hard fact that poor parents wishing a nonpublic school education for their children are deprived of a free and fair choice. Moreover, Section 2 does not relieve those poor parents of the economic burdens associated with nonpublic school education, but simply alleviates those burdens to the very minor and limited extent of either half of the tuition paid or \$5 or \$10 per month per child, whichever is less. This is only a fraction of the total cost of even the secular aspect of their tuition.

### Conclusion

It is submitted that the District Court erred in deciding that Section 2 violates the Establishment Clause, that the questions presented by this appeal are substantial and of extraordinary public importance, and that this Court should note probable jurisdiction.

December 21, 1972

Respectfully submitted,

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